

6-22-2007

Losser v. Bradstreet Respondent's Brief Dckt. 33932

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IN THE SUPREME COURT OF THE STATE OF IDAHO

CHARLES OLIVER LOSSER,

Plaintiff/Respondent,

VS.

SHAUNA RAE BRADSTREET,

Defendant/Appellant.

Docket No. 33932

RESPONDENT'S BRIEF

Appealed from the District Court of the Fourth Judicial
District of the State of Idaho, in and for Ada County

Honorable D. Duff McKee, District Judge

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STATEMENT OF THE CASE

Nature of the Case

The case before the court is a claim for damages for a civil wrong.

Respondent claims that his sister, appellant, forged their mother's Will disinheriting respondent and attempted to probate the Will upon their mother's death.

Course of Proceedings

Respondent does not take issue with Appellant's rendition of the course of the proceeding.

Statement of Facts

Charles O. Losser, Respondent, and Shauna Rae Bradstreet, Appellant, are brother and sister and the only children of Bonnie F. Losser who died on November 12, 2004.

On December 7, 2004, Shauna Rae Bradstreet filed a Petition for Informal Probate under Ada County Case No. SPIE0400542 submitting with that Petition a writing that she claimed under oath to be the Last Will of Bonnie F. Losser, it was a forgery of her own creation.

The forged Will submitted under the informal probate disinherited Charles O. Losser. The Will submitted which disinherited Charles O. Losser was a forgery created and forged by Shauna Rae Bradstreet with the specific intent and purpose of depriving Charles O. Losser of his share of his mother's estate as she had intended in a will she had made in January of 1999.

The creation of the forged Will and its submission to probate by the defendant were intentional and willful acts of Shauna Rae Bradstreet causing her brother Charles O. Losser to incur substantial expenditures of time, expert witness fees, costs and attorney's fees to present his objection to the probate court opposing the petition for the forged Will.

The action of Shauna Rae Bradstreet was oppressive, fraudulent, malicious and outrageous permitting the award of punitive damages for such conduct. (Tr. pp. 3-5).

The above rendition of the facts in this case are identical to the allegations of the complaint filed in this matter and are the facts against which any determination must be measured.

Issues Presented on Appeal

Appellant Bradstreet has raised four issues on appeal and additionally claims attorney fees and costs. Respondent Losser will address the issues in the order presented and, additionally, request that he be awarded his costs and attorney fees on this appeal.

I.

Whether the Formal Probate Proceeding is Res Judicata to Respondent's Claim for Damages.

Respondent submits the answer to this issue is "no".

Contrary to the assertion of counsel for appellant the formal estate proceeding has not been completed. A Notice of Appeal from the May 14, 2007, Closing Order was filed on June 22, 2007. A true and correct copy of that Notice of Appeal is submitted in Appendix One of this brief since this action was taken subsequent to the transcript and record preparation and

submitted to this Court. Notwithstanding the status of the probate case respondent believes its relevancy is an evidentiary matter only and not preclusive of an action against an offending party. The estate is not a party to the case at bar.

Appellant argues that by virtue of Idaho Code §15-1-106 a fraud remedy is available which therefore necessitates the action be maintained as a claim in the probate proceeding. Undersigned counsel does concede that initially without any research into the matter it did seem that the facts of the case sounded as a “fraud” action. However, some little research reveals that these facts do not contain the requisite fundamental elements of a fraud case. Lettunich v. Key Bank National Assoc’n, (Idaho 2005) 141, Idaho 362, 109 P.3d 1104, setting out the fraud requirements at page 368 of 141 Idaho as follows:

“Fraud requires: (1) a statement or a representation of fact; (2) its falsity; (3) its materiality; (4) the speaker’s knowledge of its falsity; (5) speaker’s intent that there be reliance; (6) the hearer’s ignorance of the falsity of the statement; (7) reliance by the hearer; (8) justifiable reliance; and (9) resultant injury.” Citing cases.

This is not a fraud case. The respondent “called foul” immediately and then spent considerable time and funds to stop the attempted fraud. There is no ignorance of the falsity of the signature or reliance thereon by the respondent. A fraud action cannot be maintained with the awareness and knowledge of the respondent.

This action is a separate “Tort” (civil wrong) by Appellant Bradstreet against the Respondent Losser. It has been characterized as Interference with Right to Share Decedent’s Estates, 39 Am Jur Proof of Facts beginning at page 177.

“This fact question may arise in a Will Contest, when or after the Will is offered for probate or in an independent tort action for damage.”

See also 22 ALR 4th 1230 et seq.

II.

Whether Losser Can Maintain an Independent Action for Damages.

Appellant next postures the issue in a manner that ignores and overlooks Respondent Losser’s allegations to be allowed, pursuant to Idaho Code §6-1604 to pursue punitive damages for the willful and intentional wrongdoing of appellant Bradstreet. Stated another way, appellant’s assert that Respondent Losser is restricted in his choice of remedies and recovery for attorney’s fees and costs only. Such is only a portion of Losser’s complaint and overlooks the punitive damages portion of his complaint.

Respondent’s complaint contains simple, concise and direct statements fairly apprising the defendant (and the court) the grounds upon which it rests. Appellant believes and argues that it satisfies the requirements of I.R.C.P. 8(a)(1) and (3). See Hauschulz v. State Department of Correction, _____ P.3d _____ Court of Appeals Decision Docket No. 31631 described on “Casemaker”, as 2006 Opinion No 72. See also Clark v. Olsen, 110 Idaho 323, 715 P.2d 993 (1986), Farrell v. Brown, 111 Idaho 1027, 729 P.2 1090 (1986) and Myers v. A.O. Smith, 114 Idaho 432, 757 P.2d 695 (1988).

Appellant argues and the Probate Court agreed, notwithstanding Judge McKees’ decision to the contrary, that absent a contract or statute, the complaint failed to state a “cause of

action or claim for relief”, that Respondent’s recourse was to seek attorney’s fees pursuant to Rule 54 or Idaho Code §15-1-106 in resisting Appellant’s Probate Petition and that such was the sole remedy. Respondent disagrees and argues that to merely recover the costs and fees at that time would not properly or adequately redress the wrong that Appellant was guilty of. Forgery with the intent and attempt to deprive Respondent of his rightful share of his mother’s estate. Rule 54 I.R.C.P. is not a vehicle through which such redress of that grave wrong could be addressed. For the reasons described in the preceding discussion Idaho Code §15-1-106 is not applicable or appropriate because this case is not a “fraud” action. Only through an award of punitive damages (I.C. §6-1604) could the proper and adequate redress of this grave wrong be corrected. Rule 54 I.R.C.P. does not provide for or allow punitive damages.

Appellant continues, criticizing Judge McKees’ failure to cite any legal authority for his reasoning and decision that an action could be maintained against a third party independent of the probate case in which the costs were incurred (Tr. pp. 50-50), acknowledging that authority does exist in the case of Koelker v. Turnbull, (Idaho 1995) 127 Idaho 262, 899 P.2d 972.

Respondent has no cause of action against the estate of his mother as it pertains to the “forgery” of his sister, the appellant. The cause of action for her tortuous conduct is against her individually.

Likewise, for appellant to suggest that the estate proceeding was the sole basis for personal jurisdiction over her wrongful acts is totally without merit. So also are the arguments that certain of Respondent Losser’s expenses were not recoverable damages. While such may

indeed be the case, they are the subject matter of evidentiary admissibility and not the determining factor

as to whether a claim for relief has been plead in proper fashion against the appellant.

III.

Losser's Independent Action for Litigation Expenses Incurred in a Probate Proceeding are Properly Heard by the Probate Court.

Appellant continues to overlook and ignore respondent's claim for punitive damages. This is the real gravamen of respondent's complaint.

Respondent disagrees with appellant's reading of Osborn v. Ahrens, (Idaho 1989) 116 Idaho 14, 773 P.2d 282, and directs the court's attention to the following portions of the opinion forward beginning at page 15 of 116 Idaho:

"In the instant action the sellers, Osborns, sought damages which could not otherwise be recovered for the default of the Alexanders. The jury was required by a special verdict form to ascertain the liability if any, of Ahrens, and to calculate damages based on "any amount that [plaintiffs] would have been entitled to recover if the signature of Dorothy Alexander had been found to be hers in the mortgage...." The jury found liability on the part of Ahrens and assessed damages in the amount of approximately \$145,000.00 based on the unpaid principal of the promissory note assertedly executed by the Alexanders in favor of the Osborns. That amount included approximately \$40,000.00 in accrued interest, plus approximately \$5,700.00 for plaintiffs' attorney fees incurred in the previous *Osborn v. Alexander* action. To that amount the trial court added prejudgment interest of \$28,833.00, based on the contract rate of interest compounded annually, and costs of \$2,329.00."

and continuing further:

“The improper notarization of an instrument either negligent or fraudulent, has been recognized as the proximate cause of loss. *McWilliams v. Clem*, 743 P.2d 577 (Mont. 1989). As stated by that court:

The court of the notary in the certificate that Joan McWilliams had personally appeared before the notary to acknowledge the instrument was false. Based on the false certificate of acknowledgment by the notary, the deed was entitled to be accepted for recording ... The false certificate of acknowledgment was a proximate cause to those subsequent transactions. To hold otherwise would be to frustrate the very purpose of the statutes requiring such certificates.

Here, the jury found the acts of Ahrens to be the proximate cause of the Osborn loss. As previously noted, the jury assessed damages based on the unpaid principal balance of the promissory note, plus past due interest at the rate of ten percent, as set forth in the promissory note. The jury verdict also included as award of attorney fees from the previous action against the Alexanders. We find no error in the measure of damage utilized by the court in its instructions to the jury in the instant case.”

Appellant continues with a discussion of Miller v. Prater, (Idaho 2005) 141 Idaho 208, 108 P.3d 355, for the appropriateness of the probate court bearing the proper court to adjudicate the present case. Again, respondent disagrees this is not an action against the estate nor is it an action to require an adjustment in any distribution in the estate proceeding.

IV.

The Magistrate Properly Awarded Bradstreet her Costs and Attorney Fees in Defending Against an Independent Action for Costs and Attorney Fees.

Respondent believes not.

Respondent believes that Judge McKee properly analyzed this proceeding and reached the correct decision after applying his knowledge, wisdom and judicial experience and that his determination in reversing and denying the award of attorney fees to appellant should stand.

V.

Respondent Losser is Entitled to his Costs and Fees on Appeal.

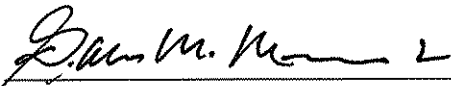
Pursuant to I.A.R. Rule 41(a), Respondent Losser requests his attorney fees incurred in this appeal.

CONCLUSION

Respondent respectfully urges this court to affirm the decision of District Judge McKee. To hold otherwise would allow a willful intentional and malicious act to go unpunished and inflict further damage upon respondent.

Respectfully submitted this 3rd day of July, 2007.

Merrick Law Office

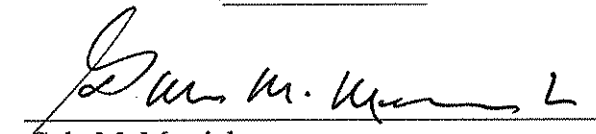
By 
Gale M. Merrick
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of July, 2007, I caused to be served a true and correct copy of the foregoing **RESPONDENT'S BRIEF** in the above-referenced matter by the method indicated below, and addressed to the following:

Louis L. Uranga
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714 North 5th St.
Boise, Idaho 83702

X *HAND DELIVER*
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FILED
A.M. P.M.
JUN 22 2007
J. DAVID NAVARRO, Clerk
By J. EARLE
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

In the Matter of the Estate of:

BONNIE F. LOSSER,

Deceased,

)
) Case No. SPIE0400542M
)

) NOTICE OF APPEAL
)

) Fee Category: R 1.c.
)

) Fee: \$53.00
)
)

PLEASE TAKE NOTICE that Charles O. Losser hereby appeals from the court's denial of his Objection to Final Accounting and the Estate Closing Order entered in the above matter on May 14, 2007.

In accordance with Rule 83(f) I.R.C.P. the following statement is made:

1. The title of the court from which the appeal is taken is the Magistrate Division of the above entitled court.

2. The title of the court to which this appeal is taken is the District Court of the above entitled court.

3. The date of entry of the Order appealed from is May 14, 2007. The heading of the matter is the same as the above captioned heading.

4. This appeal is taken upon matters of law and of fact.

5. The testimony of the proceeding before the Magistrate was recorded on an electronic recording device believed to be in the possession of the clerk of the above entitled court.

6. A statement of the issues to be raised on this appeal will be filed within fourteen (14) days after the filing of this notice of appeal.

Dated this 22nd day of June, 2007.

MERRICK LAW OFFICE

By Gale M. Merrick
Gale M. Merrick
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 22 day of June, 2007, I caused to be served a true and correct copy of the foregoing NOTICE OF APPEAL in the above-referenced matter by the method indicated below, and addressed to the following:

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